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No. 08-294
(consolidated with No. 08-289)

IN THE
Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES
and PRESIDENT OF THE ARIZONA SENATE,
Petitioners,
v.
MIRIAM FLORES, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* OUT OF TIME AND BRIEF *AMICI CURIAE* OF 30 RECOGNIZED LEADERS OF EDUCATION RESEARCH IN SUPPORT OF NEITHER PARTY

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Motion for Leave to File a Brief *Amici Curiae* Out of Time

The *Amici Curiae* respectfully request that the Court grant their motion to file this Brief *Amici Curiae* out of time. The *Amici* submit this brief in support of neither party to bring to the Court's attention the consensus among education researchers regarding the interplay of output-focused and input-focused education policies.

This brief is filed out of time because it responds to a contention concerning "the dominant view of scholars" on education reform made by a group of "Education Policy Scholars" in a Brief *Amici Curiae* filed in support of petitioners on February 26, 2009 – the same day a brief in support of neither party would have been due under Supreme Court Rule 37.3. As a result, the *Amici* did not and could not have become aware of this contention until after February 26, and therefore could not have filed this brief within the time allotted under Supreme Court Rule 37.3.[1/]

The *Amici* have sought and received consent of all parties to file this brief, as required by the first sentence of Supreme Court Rule 37.3(a), subject to the Court's granting of this motion.

1/ The Court recently granted a similar motion to file a brief *Amicus Curiae* in support of neither party out of time where the *Amicus* sought to respond to points made in two briefs *Amici Curiae*, one submitted on behalf of the petitioner and the other on behalf of neither party. *Caperton v. A.T. Massey Coal Company, Inc.*, No. 08-22 (motion for leave to file amicus brief out of time granted February 20, 2009).

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of *Amici Curiae* 1

Summary of Argument 10

Argument 11

I. Sound Education Policy Necessarily Focuses on Support Systems and Other Inputs in Tandem with Outcome-Based Results 11

A. Effective Education Policy Combines Standards-Based Concepts with Consideration of the Supports and Resources Necessary to Meet Those Standards 12

B. Measurement of Outcomes Should Be Used to Guide Needed and Appropriate Inputs 18

Conclusion 20

TABLE OF AUTHORITIES

Page

STATUTES AND LEGISLATIVE MATERIALS

Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 (2006) 11

Education Council Act of 1991, Pub. L. No. 102-62, 105 Stat. 305 (1991) 16

No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002). 10, 11

Supreme Court Rule 37.3..... 1

Supreme Court Rule 37.6..... 1

National Council on Education Standards and Testing; Notice of Meetings, 56 Fed. Reg. 59,251 (Nov. 25, 1991) 16

OTHER AUTHORITIES

American Psychological Association, *Appropriate Use of High-Stakes Testing in Our Nation's Schools* (2001) 17, 19

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Eva L. Baker & Robert L. Linn, *Validity Issues for Accountability Systems*, *in Redesigning Accountability Systems for Education* 47 (Susan H. Fuhrman & Richard F. Elmore eds., 2004) 17-18

Other Authorities – Continued

Page

Jaekyung Lee & Kenneth K. Wong, *The Impact of Accountability on Racial and Socioeconomic Equity: Considering Both School Resources and Achievement Outcomes*, 41 Am. Educ. Res. J. 797 (2004) 13, 19

Jennifer A. O'Day, *Complexity, Accountability, and School Improvement*, 72 Harv. Educ. Rev. 293 (2002) 13, 18

Katherine E. Ryan, *Fairness Issues and Educational Accountability*, *in The Future of Test-Based Educational Accountability* 191 (Katherine E. Ryan & Lorrie A. Shepard eds., 2008) 13

Linda Darling-Hammond, *Creating Standards of Practice and Delivery for Learner-Centered Schools*, 4 Stan. L. & Pol'y Rev. 37 (1993) 16

Milbrey W. McLaughlin & Lorrie A. Shepard, *Improving Education Through Standards-Based Reform: A Report By the National Academy of Education Panel on Standards-Based Education Reform* (Deborah Fife ed., 1995) 15, 16

Nat'l Ctr. for Research on Evaluation, Standards, and Student Testing, *Educational Assessment: Expanded Expectations and Challenges* (1993) 16

Richard F. Elmore, *Conclusion*: *The Problem of Stakes in Performance-Based Accountability Systems*, *in Redesigning*

Other Authorities – Continued

Page

Accountability Systems for Education 274 (Susan H. Fuhrman & Richard F. Elmore eds., 2004) 18, 19

Susan H. Fuhrman, *Introduction to Redesigning Accountability Systems for Education* (Susan H. Fuhrman & Richard F. Elmore eds., 2004) 13

INTEREST OF *AMICI CURIAE*[1/]

Amici submit this brief in response to the contention by a group of "Education Policy Scholars" in an *amicus* brief submitted in support of petitioners that the No Child Left Behind Act of 2001 reflects "the dominant view of scholars that educational reform should focus on student performance – the output of school systems – rather than inputs such as funding levels."[2/]

The *Amici* are distinguished and prominent scholars and researchers who are recognized leaders in the field of education policy and research, almost all of whom have been elected to the position of president of the National Academy of Education and/or of the American Educational Research Association.[3/]

1/ Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and no person or entity, other than *Amici Curiae* or their counsel, made a monetary contribution to the preparation of this brief. Pursuant to Supreme Court Rule 37.3, counsel of record for Petitioners and Respondents have consented to the filing of this brief in letters that have been lodged with the Clerk's office.

2/ Brief of Education Policy Scholars as *Amicus Curiae* in Support of Petitioners, filed with this Court, February 26, 2009, at 3 ("Brief of Education Policy Scholars").

3/ The National Academy of Education, founded in 1965, advances education research and its use in policy formation and practice. Its members are elected on the basis of outstanding scholarship or contributions to education. The American Educational Research Association, founded in 1916, is an international professional organization dedicated to advancing education research and its practical application. As set forth below, *Amici* submit this brief only in their individual capacities and not on behalf of these organizations.

Amici are therefore well-positioned to speak to the views of academic experts in education policy and research.

The *Amici* seek only to discuss the prevailing views of leading scholars in the field of education research and do not offer any argument about the relationship of the Equal Educational Opportunities Act to the No Child Left Behind Act, nor of the merits or value of these Acts. The *Amici* submit this brief to offer their best judgment of the consensus among the vast majority of prominent education researchers regarding the interplay of output- and input-oriented policies.

Input-oriented policies focus on instructional quality and academic supports for learning. Output-oriented policies, such as those embodied in the No Child Left Behind Act of 2001, are focused on measured results of schooling. Based on empirical research, leading scholars in the field have concluded that education policy risks failure when it focuses predominantly on outcomes alone without giving sufficient attention to supports for student achievement and instructional quality. This is particularly true with regard to the education of at-risk groups such as the English Language Learners in the present case. Briefly stated, the position of leading scholars in the field is that well-crafted outcome- and input-based education policies are mutually reinforcing.

As recognized leaders in the field, the *Amici* have an interest in accurately representing the views of education researchers concerning the necessary balance between outcome-based education policies and the appropriate academic supports and instructional quality needed to achieve designated measures of

success. *Amici* are concerned that the importance of inputs and investments in education should not be overlooked when implementing output-focused policies.

Amici are:

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Amici are submitting this brief solely in their individual capacities. The views expressed are those of the named *Amici* only and are not necessarily the views of the institutions, organizations, or employers with which *Amici* are or have been affiliated.

SUMMARY OF ARGUMENT

The No Child Left Behind Act of 2001 (NCLB)[4/] focuses primarily on the outcome of school practices and policies and is premised on the view that outcomes must guide the direction and utilization of resources allocated to those practices and policies.

Although scholars vary in the degree to which they endorse NCLB, there is little or no dispute that adopting outcome-based policies does not, and should not, preclude consideration and utilization of input-oriented policies. Scholars generally agree that a focus on outcomes, such as test scores and graduation rates, and the strategic use of inputs, such as quality teachers and academic supports (including up-to-date textbooks, computers, and laboratories, as well as specialized programs aimed at students or mentoring programs for beginning teachers), are both important to improving student achievement – even when those scholars disagree about the particular elements or strengths of a given policy or the ideal balance between input- and output orientation.

From the vantage point of having served in the highest elected – and other leadership – positions in the field, *Amici* can state that the prevailing view among education policy scholars is that sound standards-based accountability policies should be *combined* with policies that provide the supports necessary to meet those standards. In fact, a major

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4/ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

assumption of the standards-based reform approach underlying NCLB is that knowledge of outcomes should guide needed and appropriate investments where achievement is lagging.

There exists no substantial dispute in the research community that high-quality academic supports increase the likelihood that educators and students will reach ambitious outcome-oriented goals. Policies concerning outcomes should not be considered independently of policies focused on investments.

ARGUMENT

I. SOUND EDUCATION POLICY NECESSARILY FOCUSES ON SUPPORT SYSTEMS AND OTHER INPUTS IN TANDEM WITH OUTCOME-BASED RESULTS.

Pending before this Court are questions related to education policy, the roles of federal and state governments in determining and utilizing effective programs and practices, and the roles of two federal statutes, the Equal Educational Opportunities Act of 1974,[5/] and the No Child Left Behind Act of 2001.[6/] The Court has received arguments attempting to show that one education policy is better or more accepted than another. One group in particular, composed of some "Education-Policy Scholars," makes the claim that the dominant view among education researchers and policy experts is that NCLB

5/ 20 U.S.C. § 1701 et seq. (2006).

6/ Pub. L. No. 107-110.

and outcome-focused education policies have supplanted or obviated the need for policies that focus on "inputs" or what supports go into school systems.[7/]

These individuals appear to suggest that attention to inputs is unnecessary and disfavored among education policy scholars. But schools cannot generate quality results or improve academic performance without identifying needs and then acquiring and allocating necessary inputs. The widely accepted view among researchers and scholars of education policy is that sound policy makes use of not just standards and outcome measures, but also corresponding, adequate, and appropriate supports for teaching and learning. The focus is not about resources or funding for their own sake but, instead, the kinds of support system that they make available, such as mentoring programs for new and relocating teachers, programs designed to improve and retain highly qualified teachers, up-to-date textbooks, computers, and laboratories.

A. Effective Education Policy Combines Standards-Based Concepts with Consideration of the Supports and Resources Necessary to Meet Those Standards.

Adopting outcome-based or accountability policies does not preclude consideration and utilization of input-oriented policies. Outcome-based policies focus on measured results of schooling, such as student

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7/ Brief of Education Policy Scholars, *supra* note 2.

test scores and graduation rates.[8/] Input-based policies focus on such elements as highly qualified teachers, up-to-date textbooks, computers and laboratories, and specialized programs aimed at students or mentoring programs for beginning teachers.[9/]

"Both *resource access* and knowledge about *resource use* and *how resources are deployed* are essential to improving schools and student learning. … Educational accountability based on this framework emphasizes high standards for all *and* makes 'conditions under which students are educated' equally important."[10/]

The prevailing perspective of leading scholars is that a focus on outcomes and the strategic use of inputs are both of critical importance to improving

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[8/] *See* Susan H. Fuhrman, *Introduction to Redesigning Accountability Systems for Education* 4-9 (Susan H. Fuhrman & Richard F. Elmore eds., 2004) (discussing the development of outcome-focused education policies).

[9/] *See* Jaekyung Lee & Kenneth K. Wong, *The Impact of Accountability on Racial and Socioeconomic Equity: Considering Both School Resources and Achievement Outcomes*, 41 Am. Educ. Research J. 797, 800 (2004).

[10/] Katherine E. Ryan, *Fairness Issues and Educational Accountability*, *in The Future of Test-Based Educational Accountability* 191, 205 (Katherine E. Ryan & Lorrie A. Shepard eds., 2008) (emphasis in original; internal citations omitted); *see also* Jennifer A. O'Day, *Complexity, Accountability, and School Improvement*, 72 Harv. Educ. Rev. 293, 294 (2002) ("accountability systems will foster improvement to the extent that they generate and focus attention on information relevant to teaching and learning, motivate individuals and schools to use that information and expend effort to improve practice, build the knowledge base necessary for interpreting and applying the new information to improve practice, and allocate resources for all of the above").

student achievement. This is so even where scholars disagree about the particular elements or strengths of a given policy or how the two should be balanced.[11/]

For instance, a 1999 guide from the National Research Council presents this understanding of outcome-based reforms as being tightly linked to addressing inputs:

> Accountability should follow responsibility: teachers and administrators – individually and collectively – should be held accountable for their part in improving student performance. Teachers and administrators should be accountable for the progress of their students. Districts and states should be accountable for the professional development and support they provide teachers and schools to enable students to reach high standards.[12/]

The National Research Council authors then add the recommendation that "[a]ssistance should be aimed at strengthening schools' capacity for educating all students to high standards" and that such as-

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11/ As the "Education-Policy Scholars" recognized, individual states may struggle to meet standards and need to reform finance policies in order to comply with the standards of NCLB. *See* Brief of Education Policy Scholars, *supra* note 2, at 17.

12/ Comm. on Title I Testing and Assessment, Nat'l Research Council, *Testing, Teaching, and Learning: A Guide for States and School Districts* 97 (Richard F. Elmore & Robert Rothman eds., 1999).

sistance should always be provided "before sanctions."[13/]

An earlier report by the National Academy of Education similarly concluded that "[e]ducators need both knowledge and expertise to proceed, as well as substantial resources for putting into practice the changes demanded by the [standards-based] reforms."[14/] That report cautioned,

> Between communities and even within the same schools, students of differing circumstances have differential access to experienced and knowledgeable teachers, to computers and books, and a classroom atmosphere focused on learning; in some communities even the most rudimentary requirements of clean, safe, and healthy school facilities are not met.[15/]

Such "[u]nequal resources contribute, in turn, to unequal results on high-stakes tests...."[16/] And "[m]erely declaring higher expectations without implementing concomitant changes in curriculum, instructional practices, and resources may doubly victimize students if and when they fall short of the standards."[17/]

13/ *Id.* at 98.

14/ Milbrey W. McLaughlin & Lorrie A. Shepard, *Improving Education Through Standards-Based Reform: A Report by the National Academy of Education Panel on Standards-Based Education Reform* 64 (Deborah Fife ed., 1995).

15/ *Id.* at 11.

16/ *Id.*

17/ *Id.* at 12.

The standards-based reform movement was in many ways launched by an Education Summit of the 50 Governors, convened in 1989 in Charlottesville, Virginia, by President George H. W. Bush.[18/] Congress created the National Council on Education Standards and Testing (NCEST) in June 1991 to help implement the ideas from that summit.[19/] The NCEST Standards Task Force report concluded:

> If not accompanied by measures to ensure equal opportunity to learn, national content and performance standards could help widen the achievement gap between the advantaged and the disadvantaged in our society. … Standards and assessments *must be accompanied by policies that provide access for all students to high quality resources*, including appropriate instructional materials and well-prepared teachers.[20/]

The research community has determined that high-quality academic supports are generally necessary for educators and students to reach ambitious

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18/ *See id.* at xv.

19/ *See* Education Council Act of 1991, Pub. L. No. 102-62, 105 Stat. 305 (1991); National Council on Education Standards and Testing; Notice of Meetings, 56 Fed. Reg. 59,251 (Nov. 25, 1991) (explaining purpose of council); Nat'l Ctr. for Research on Evaluation, Standards, and Student Testing, *Educational Assessment: Expanded Expectations and Challenges* 7 (1993), *available at* http://www.cse.ucla.edu/products/Reports/TECH351.pdf (creation of NCEST).

20/ Linda Darling-Hammond, *Creating Standards of Practice and Delivery for Learner-Centered Schools*, 4 Stan. L. & Pol'y Rev. 37, 38 (1993) (*quoting* National Council on Education Standards and Testing, *Raising Standards for American Education* 13 (1992)) (emphasis added).

outcome-oriented goals. Neither policies championing inputs nor those focused on outcomes should be considered independently. These non-controversial points have been made by many. As the American Psychological Association has pointed out:

> [T]est users must ensure that results are truly indicative of student achievement rather than a reflection of the quality of school resources or instruction. It is only fair to use test results in high-stakes decisions when students have had a real opportunity to master the materials upon which the test is based.
>
> Therefore, in conjunction with supporting the use of tests to evaluate performance, public policymakers should also support research on the consequences of such testing, and localities should work to provide the resources necessary for schools to provide quality educational opportunities and achieve real student growth and learning, not just "teaching to the test" skills acquisition.[21/]

Moreover, as two of the most respected researchers in the field have stated, policies that put in place incentives to achieve certain goals and sanctions for failing to do so

> will not necessarily enable the people in classrooms and schools … systematically to improve learning for students who have done poorly in the past. … [They] indeed may focus

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21/ American Psychological Association, *Appropriate Use of High-Stakes Testing in Our Nation's Schools* (May 2001), *available at* http://www.apa.org/pubinfo/testing.html.

> attention on the bottom line, but not on needed steps or processes to get there.[22/]

These scholars also point out that policy makers should not generally expect "a lack of capacity" to be "directly remedied by increased motivation to do well[.]"[23/]

B. Measurement of Outcomes Should Be Used to Guide Needed and Appropriate Inputs.

A major assumption of the standards-based reform approach underlying NCLB is that knowledge of outcomes should guide needed and appropriate investments where achievement is lagging. "[O]ne of the most promising aspects of outcomes-based school accountability is the use of information to direct attention and resources where they are most needed."[24/]

Testing, therefore, should be a means to an end, and not just an end in itself. It should be used to show where further support and investment are nec-

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22/ Eva L. Baker & Robert L. Linn, *Validity Issues for Accountability Systems*, *in Redesigning Accountability Systems for Education*, *supra* note 8, at 47, 49.

23/ *Id.*

24/ O'Day, *supra* note 10, at 314; *see also* Richard F. Elmore, *Conclusion: The Problem of Stakes in Performance-Based Accountability Systems*, *in Redesigning Accountability Systems for Education*, *supra* note 8, at 274, 294 (one of the principles of designing accountability systems should be "the reciprocity of accountability and capacity – for each increment in performance I require of you, I have an equal and reciprocal responsibility to provide you with the capacity to produce that performance.").

essary. As set forth in a position statement of the American Psychological Association discussing the official *Standards for Educational and Psychological Testing*, "in many instances, without tests, low-performing students and schools could remain invisible and therefore not get the extra resources or remedial help that they need."[25/] One of the primary values of testing is its ability to inform capacity-building. "Improvement can be measured, in part, by the assessments used in accountability systems, but these systems do not, in themselves, provide the capacities to improve."[26/] Thus, "the actual impact of state accountability policies on academic excellence and equity may turn out to be contingent upon the level of support available to schools, teachers, and students."[27/] What is needed, then, is a combination of outcome-based and input-based approaches.[28/]

[*Remainder of page left blank intentionally*]

25/ American Psychological Association, *supra* note 21.

26/ Elmore, *supra* note 24, at 290.

27/ Lee & Wong, *supra* note 9, at 799.

28/ *Id.* at 801.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request that this Court give due consideration and appropriate weight to the necessary relationship between outcome-based and input-focused education policies in evaluating the case before it.

Respectfully submitted,

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